AEH Capital Sdn Bhd v AM-EL Holdings Sdn Bhd

HIGH COURT (KUALA LUMPUR) — SUIT NO S2–24–2274 OF 1999
KAMALANATHAN RATNAM J
2 OCTOBER 2000

Moneylenders *— Loan on security — Defendant defaulted on repayment of loan — Plaintiff applied for an order for sale — Whether plaintiff in breach of s 22 of the Moneylenders Act 1951 for charging excessive interest — Whether plaintiff exempted under s 2A(2) of the Moneylenders Act 1951 — Onus of proof — Whether the loan was to facilitate a share financing transaction — Moneylenders Act 1951 ss 2A(2), 22*

The defendant applied for a loan from the plaintiff with securities. A loan agreement was subsequently executed between the parties. The defendant defaulted in payment, hence the plaintiff applied for an order for sale of the securities furnished by the defendant. The defendant resisted the application contending that the plaintiff had breached s 22 of the Moneylenders Act 1951 ('the Act') because the loan in question was a secured loan and the plaintiff ought not to have charged interest in excess of 12%pa. The plaintiff however pointed out that the Ministry of Housing and Local Government had pursuant to s 2A(2) of the Act exempted the plaintiff from the Act for a period of three years provided that the activities are limited to credit leasing and share financing.

Held, dismissing the plaintiff's application:

(1) The present loan is not a share financing transaction due to the absence of evidence to the contrary. The plaintiff has failed to annex any security documents to any affidavit to show that the loan is indeed in respect of a share financing scheme. On the contrary, there is clear averment by the defendant that the plaintiff had not entered into any agreement with Mahabudi to purchase its shares (see p 479H–I).

(2) The onus is on the plaintiff to proof that he comes under the categories provided by s 2A(2) of the Act, not for the defendant to prove otherwise. The plaintiff can only be exempted from the Act if the plaintiff can show that the loan was limited to share financing (see p 480B).

[Bahasa Malaysia summary

Defendan telah memohon satu pinjaman daripada plaintif dengan cagaran. Satu perjanjian pinjaman telah disempurnakan berikutan itu antara pihak-pihak tersebut. Defendan telah gagal membuat bayaran, oleh itu plaintif telah memohon satu perintah jualan cagaran-cagaran yang diberikan oleh defendan. Defendan menentang permohonan tersebut dengan menegaskan bahawa plaintif telah melanggar s 22 Akta Pemberipinjam Wang 1951 ('Akta tersebut') kerana pinjaman yang dipersoalkan merupakan satu pinjaman bercagar dan plaintif

tidak sepatutnya mencagarkan faedah lebihan 12% setahun. Plaintif bagaimanapun menegaskan bahawa Kementerian Perumahan dan Kerajaan Tempatan telah menurut s 2A(2) Akta tersebut mengecualikan plaintif daripada Akta tersebut bagi satu tempoh tiga tahun dengan syarat bahawa aktiviti-aktiviti tersebut terhad kepada pinjaman kewangan dan pembiayaan syer.

Diputuskan, menolak permohonan permohonan tersebut:

(1) Pinjaman sekarang bukan satu transaksi pembiayaan syer disebabkan ketiadaan keterangan yang bertentangan. Plaintif telah gagal untuk melampirkan apa-apa dokumen cagaran kepada mana-mana afidavit untuk menunjukkan bahwa pinjaman tersebut sememangnya berhubung satu skim pembiayaan syer. Sebaliknya, terdapat penegasan jelas oleh defendan bahawa plaintif tidak memasuki apa-apa perjanjian dengan Mahabudi untuk menjuak syer-syernya (lihat ms 479H–I).

(2) Beban adalah atas plaintif untuk membuktikan bahawa beliau jatuh di dalam kategori yang diperuntukkan oleh s 2A(2) Akta tersebut, bukan untuk defendan membuktikan sebaliknya. Plaintif boleh hanya dikecualikan daripada Akta tersebut jika plaintif boleh menunjukkan bahawa pinjaman tersebut terhad kepada pembiayaan syer (lihat ms 480B).]

Notes

For cases on moneylenders generally, see 10 *Mallal's Digest* (4th Ed, 1996 Reissue) paras 385–534.

Legislation referred to

Moneylenders Act 1951 s 2A(2), 22

Mazlin Haslinda Mohammed (*Wong Lu Peen & Tunku Alina*) for the plaintiff.

TS Marbeck (*Yahna SG* with him) for the defendant.

Kamalanathan Ratnam J. : By way of a letter dated 17 May 1996 the defendant applied to the plaintiff for a loan of RM4m and offered as security:

(a) first party assignment over 47 units of condominiums known as Setapak Ria Condominium, held under Master Title Geran 465, Lot 1130, Mukim of Setapak, Negeri Wilayah Persekutan;

(b) An irrevocable call/put option to purchase 30% of the issued and fully paid shares of Mahabudi Development Sdn Bhd ('Mahabudi') for RM4m. This option was to be effective upon the occurrence of a default of the loan;

(c) a corporate guarantee of Tempamas Sdn Bhd; and

(d) a personal guarantee by one Low Koon Chuan, Michael.

By a letter of offer dated 24 May 1996 the plaintiff granted the defendant a term loan of RM4m on the following, inter alia, terms and conditions:

Purpose	:	To part finance purchase of the fully issued and paid up capital of Mahabudi.
Interest Rate	:	At 24.73%pa ('prescribed rate'), ie RM748,000 (Ringgit Malaysia Seven Hundred Forty Eight Thousand Only) and is payable upfront on the date of the drawdown of TL.
Advisory Fee	:	At 4% flat on the loan amount, ie RM160,000 (Ringgit Malaysia One Hundred Sixty Thousand Only) and is payable upfront on the date of the drawdown of TL.
Drawdown	:	In one lump sum on 5 June 1996
Tenure/ Repayment	:	Repayable in one lump sum nine months from the date of first drawdown, ie 5 March 1997.

A loan agreement between the parties was executed on 4 June 1996. As the defendant defaulted the plaintiff applied by way of these proceedings for an order for sale of the 47 units of condominiums. It is not in dispute that the plaintiff is a licensed moneylender.

Findings of the court

The defence contended that by charging an interest at 24.73%pa, the plaintiff had breached s 22 of the Moneylenders Act 1951 ('the Act') because as the loan in question was a secured loan, the plaintiff ought not to have charged interest in excess of 12%pa. The plaintiff however pointed out that the Minister of Housing and Local Government had, pursuant to s 2A(2) of the Act exempted the plaintiff from the Act for a period of three years with effect from 9 March 1996 provided that:

(a) the activities of the moneylender shall be limited to —
  (i) redit leasing: and
  (ii) share financing.

Whilst the plaintiff contends that the purpose of the loan was to facilitate a share financing transaction, unfortunately the plaintiff has failed to annex any security documents to any affidavit to show that the loan is indeed in respect of a share financing scheme to purchase the paid-up capital of Mahabudi. There is no evidence of the price of the share, etc. On the contrary there is a clear averment by the defendant in encl 12 that it had not entered into any agreement with Mahabudi to purchase its shares. Counsel for the defendant frankly conceded that the share purchase agreement had

not been exhibited. However, she referred me to the directors' circular resolution of the defendant, which stated that the purpose of the loan was to part finance the purchase of the fully issued and paid-up capital of Mahabudi. That may well be so, but when a specific challenge has been taken by the defence as to the ability of the plaintiff to take advantage of the exemption provided by s 2A(2) of the Act, the onus is on the plaintiff to produce evidence to satisfy that challenge. The plaintiff can only be exempted from the Act if it can show that the loan was limited to share financing. The agreement as such has not been exhibited.

In the circumstances, I dismissed the foreclosure proceedings with cost.

Application dismissed.

Reported by Tee Meng Meng